No. 92-259

In The

Supreme Court of the United States

October Term, 1992

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

SAC AND FOX NATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE STATES OF ARIZONA, MINNESOTA, MONTANA, NORTH DAKOTA, UTAH AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether a State has jurisdiction to impose an income tax on a resident of the State who is a member of a recognized Indian tribe and receives income from employment on the reservation, but who lives outside the reservation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

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INTEREST OF THE AMICI CURIAE

This brief addresses the issue of state income taxation of tribal members who live outside reservations. The states filing as amici curiae in support of the Petitioner on this issue have a strong interest in the outcome. All are states with Indian reservations or trust land. All have Indian populations living within and outside reservations.[1] While the Court has previously ruled a state has

[1] For example, according to the 1990 Census, Arizona has a total American Indian population of 203,527, of whom 142,238

no jurisdiction to impose an income tax on a tribal member who both lives and earns income on the reservation, the opinion below would expand this rule to limit state jurisdiction outside reservations. The ability of states to finance off-reservation services by taxing off-reservation residents who enjoy the benefits of those services is threatened by such a holding. Absent express acts of Congress, the limitations imposed on state jurisdiction by the existence of Indian reservations within their boundaries should not be expanded to restrict state law outside reservations. The current case is important in that the court of appeals decision casts doubt upon the decisions of this Court which make a clear distinction between jurisdiction within and without reservations.

SUMMARY OF ARGUMENT

In *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) this Court held the State of Arizona could not impose an income tax on a Navajo Indian residing on the Navajo Reservation for income earned exclusively on the Reservation. This holding does not prevent a state from taxing a tribal member who earns income on a reservation but resides off-reservation, beyond the exclusive jurisdiction of the tribe and United States. The court

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reside on reservations. The remaining 61,289 live throughout the State, outside any reservation. *1990 Census of Population & Housing, P.L. 94-171 Data*, prepared by: Arizona State Data Center, DES Population Statistics Unit. Many of the reservations in Arizona are contiguous to, or within reasonable commuting distance of, off-reservation population centers.

of appeals' extension of *McClanahan* to prevent the taxation of off-reservation residents is incorrect, and should be reversed.

An income tax based on the residence of the individual is not a tax on the place the income is earned, but on the receipt of the income within the jurisdiction of the taxing state. A state income tax on a resident who happens to be a member of an Indian tribe and who crosses the reservation line on a daily basis to earn wages, returning every night to a home outside the reservation, is not a tax on the reservation activity. It is a tax imposed on the state resident because of his residency.

Finally, an income tax on a nonresident of a reservation is not preempted by federal law, nor does it infringe on a tribe's self-government. A tax imposed outside a reservation will be preempted only by an express act of Congress. Congress has never acted to impose a general limit on the power of states to tax their own residents who have removed themselves from the exclusive jurisdiction of the tribes and federal government. Such a tax is no threat to the authority of the tribe. The most that can be said is that a state and a tribe both have jurisdiction to tax the same income. The imposition of taxes by separate sovereigns is not a basis for limiting State taxation. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT *MCCLANAHAN* REQUIRES RESIDENTS AND NONRESIDENTS OF A RESERVATION BE TREATED THE SAME FOR STATE INCOME TAX PURPOSES.

In *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) the Court was presented with the problem of a state income tax imposed on a reservation Indian whose entire income came from reservation sources. The Court held the state had no jurisdiction to tax the reservation Indian on such income. The court of appeals has used this case as authority for holding a tribal member who earns income on a reservation, or trust land, is exempt from state income tax, without regard to the residence of the tribal member. *Sac and Fox Nation v. Oklahoma Tax Commission.*, 967 F.2d 1425, n. 3 (10th Cir. 1992).

This extension of *McClanahan* ignores the predominant interest of states in taxing residents who benefit from the protections of state government, and ignores rulings of this Court which draw a clear line between reservation and off-reservation activities for purposes of state jurisdiction. In ruling as it did, the court of appeals failed to heed the admonition of this Court that mechanical applications of Indian law concepts are inappropriate, and each case calls for "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, . . . " *White Mountain Apache Tribe v. Bracker*, 448

U.S. 136, 145 (1980).[2] *McClanahan* does not control the issue of state income taxation of Indians who do not reside on a reservation.

In *McClanahan* the state income taxes at issue were imposed on a tribal member who resided on the Indian reservation. The Court repeatedly pointed out that the rationale for its holding was the fact that the appellant lived on the reservation. The opinion begins by stating: "We are not here dealing with Indians who have left or never inhabited reservations set aside for their exclusive use . . . " *McClanahan*, 411 U.S. at 167. In describing the issue the Court said: "Rather, this case involves the narrow question whether the State may tax a reservation Indian for income earned exclusively on the reservation." *Id.* at 168. While explaining "that state law could have no role to play within the reservation boundaries" (*Id.* at 168), the Court noted that "the [Indian sovereignty] doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community." *Id.* at 171. Throughout the opinion the issue is framed in terms of Indians living on the reservation. "Moreover, since the signing of the Navajo treaty, Congress has consistently acted upon the assumption that the States lacked jurisdiction over Navajos living on the reservation." *Id.* at 175. "This Court has therefore held that 'the question has always been whether the state action infringed on the right of *reservation Indians* to make

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[2] The appellate courts of Wisconsin have performed the required analysis, and correctly concluded nonresidents of a reservation are subject to state income tax on wages earned on a reservation. *Anderson v. Wisconsin Department of Revenue*, 163 Wis.2d 1015, 473 N.W.2d 520 (App. 1991), *aff'd.*, 169 Wis.2d 255, 484 N.W.2d 914 (1992), *petition for cert. filed*, No. 92-5988.

their own laws and be ruled by them.' " *Id.* at 181, quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959). The emphasis on reservation Indians was added by the *McClanahan* court. In conclusion the Court said, "appellant's rights as a reservation Indian were violated when the state collected a tax from her which it had no jurisdiction to impose." *Id.* at 181.

A review of the authorities relied upon by the Court also shows the ruling does not extend to protect off-reservation residents from state taxation. The Court strongly relied on the treaty between the United States government and the Navajo Nation as setting the Reservation apart for the exclusive use of the Navajos, to the exclusion of state jurisdiction. *Id.* at 173-5. However, the treaty provides "that if any Navajo Indian or Indians shall leave the reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty, . . . " Treaty with the Navajo Indians of 1868, 15 Stat. 667, 671. The Treaty expressly excludes nonresidents of the Reservation from its scope.

Similarly, the Arizona Enabling Act, relied upon by the Court, distinguishes between property within and without reservations. "The Act expressly provides that 'nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing as other lands and other property are taxed *outside of an Indian reservation* owned or held by any Indian.' " *McClanahan*, 411 U.S. at 176, quoting Arizona Enabling Act, 36 Stat. 569, 570 (emphasis added by Court). The Court relied on the negative implications of the quoted language for its determination that a tax on a reservation resident was

beyond the State's jurisdiction. Conversely, the clear intent of Congress as expressed in the Arizona Enabling Act is that an Indian going outside the reservation is subject to generally applicable state taxes.

Finally, the Court considered how a State tax on a reservation Indian residing on the reservation would fit into the overall scheme of jurisdiction. The Court noted the State lacked both civil and criminal jurisdiction over reservation Indians, and wondered "how, without such jurisdiction, the State's tax may either be imposed or collected." *McClanahan*, 411 U.S. at 178. These jurisdictional questions are easily resolved with regard to a nonresident of a reservation. The state has full civil and criminal jurisdiction over its residents, whether members of an Indian tribe or not, and it "may constitutionally administer its tax system" with regard to those residents without ever entering a reservation. *Id.*

The court of appeals' mechanical application of *McClanahan* to the issue of state taxation of nonresidents of a reservation or trust land fails to consider the rationale of that case. *McClanahan* was limited to reservation Indians, not only as a matter of fact, but of law. The reasons set forth by the Court, and the policies underlying its holding, require a different result for tribal members who do not live on their reservation.

II. STATES MAY IMPOSE AN INCOME TAX ON THE INCOME OF RESIDENTS FROM WHATEVER SOURCE, EVEN IF THE INCOME IS DERIVED FROM SOURCES BEYOND THE STATE'S JURISDICTION.

This Court's ruling in *McClanahan* requires a state to treat a reservation Indian who earns income exclusively from reservation sources as being beyond the taxing jurisdiction of the state. With regard to activities that cross reservation lines the leading treatise on Indian law has stated that "the usual rules respecting activities affecting two taxing jurisdictions should apply." F. Cohen, *Handbook of Federal Indian Law* (1982 ed.), p. 417.[3] Applying the usual rules that govern a state's power to tax the income of its residents requires a holding that a state may tax a tribal member residing off-reservation on income derived from the reservation.

This Court has consistently held that a state may tax its residents on their income from sources outside the state's jurisdiction. *Lawrence v. State Tax Comm.*, 286 U.S. 276 (1932); *Maguire v. Trefry*, 253 U.S. 12 (1920).[4] In so

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[3] "Thus an Indian residing within a reservation but earning some income off the reservation can be taxed to the extent of the off-reservation income, provided that the state bases its income tax on place of earning. An Indian residing outside Indian country can be taxed based on residence provided that the state bases its income tax on residence." F. Cohen, *Handbook of Federal Indian Law* (1982 ed.), p.417 (footnotes omitted). States with income taxes do base them alternatively on residence or place of earning. *E.g.*, Arizona Revised Statutes § 43-1011 (Supp. 1992).

[4] This Court has also held a state may tax a nonresident for income earned within the state. *Shaffer v. Carter*, 252 U.S. 37

holding the Court has recognized that even when a state lacks jurisdiction to tax the source of the income the residence of the recipient of the income within the state is sufficient to give the state jurisdiction to impose an income tax. The rationale for this principle has been explained as follows:

> That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicil itself affords a basis for such taxation. Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. . . . The tax, which is apportioned to the ability of the taxpayer to pay it, is founded upon the protection afforded to the recipient of the income by the state, in his person, on his right to receive the income, and in his enjoyment of it when received. These are rights and privileges which attach to domicil within the state. . . .
>
> Neither the privilege nor the burden is affected by the character of the source from which the income is derived. For that reason, income is not necessarily clothed with the tax immunity enjoyed by its source.

New York ex rel. Cohn v. Graves, 300 U.S. 308, 312-3 (1937).

The court of appeals incorrectly perceived the state income tax as a tax on the reservation activity. As the authorities noted above show, this is erroneous. An

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(1920). Applying this reasoning a state can tax a tribal member residing on a reservation who goes outside the reservation to work.

income tax on a resident is not a tax on property or activities outside the state, but a tax imposed in exchange for the benefits conferred by virtue of residence. To the extent a state bases its income tax on residency, and taxes its residents on all income, it matters not whether that income comes from another country, another state, or an Indian reservation. The tax "is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received." *Lawrence*, 286 U.S. at 281.[5]

A tribal member earning income on a reservation, but living off the reservation, enjoys the benefits of residence no less than any other resident of the state. Equally, the obligation of a tribal member resident to share in the

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[5] The off-reservation situs of a tax on income distinguishes this case from those cases finding a preemption of a state tax imposed on businesses traveling into a reservation to sell products or perform activities subject to a gross receipts tax. *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982); *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 169 (1980). The basis for sales and gross receipts taxes is the location of the taxed activity within the jurisdiction of the state. A state cannot impose an unapportioned sales tax on transactions crossing jurisdictional lines. However, as discussed above, a state may tax a resident on all income, including income from outside the state's jurisdiction.

As a district court judge has succinctly put it, "[t]he situs of the income is where the taxpayer lives, not where he works. Thus, the State is not attempting to impose its taxing authority within the exclusive jurisdiction of the United States and the tribes. It only seeks to tax those within the reach of its taxing power." *Dillon v. State of Montana*, 451 F.Supp. 168, 174 (D.Mont. 1978), *rev. on other grounds*, 634 F.2d 463 (9th Cir. 1980).

expenses relating to such benefits by paying taxes is no less than any other state resident. Furthermore, a state resident who does not reside on an Indian reservation is the recipient of benefits which may not be available on the reservation. The ruling of the court of appeals would hold, contrary to the precedents of this Court, that a tribal member may reside outside a reservation, within the jurisdiction of the state, receive the benefits of such residence, and yet not be taxable on the same basis as other off-reservation residents of the state. Neither federal statutory law, nor decisions of this Court, support such a ruling.

There are few bright lines in Indian law. The reservation boundary is one of those. The immunity from state law enjoyed by Indians within reservations cannot be extended to those who choose to leave its protection. Tribal members who live outside the reservation are subject to a state income tax on their total income.[6]

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[6] In *Anderson v. Wisconsin Dept. of Revenue* the tribal member who lived off-reservation argued the determination of whether a person was a "reservation Indian" for purposes of *McClanahan* should depend not on residence, but on cultural orientation and degree of assimilation. 484 N.W.2d at 922. A similar "contacts" test was rejected in *Duro v. Reina*, 495 U.S. 676, 695-6 (1990) in the context of tribal criminal jurisdiction over nonmember Indians. Accepting this argument in the context of an income tax would raise the spectre of determining taxability on an individual basis, considering contacts with the reservation, degree of assimilation, and ties to tribal government. Under such an approach the reservation boundary would disappear as the dividing line between state and tribal jurisdiction.

III. A STATE INCOME TAX ON A NONRESIDENT OF A RESERVATION IS NOT PREEMPTED BY FEDERAL LAW, NOR DOES IT INFRINGE ON TRIBAL SOVEREIGNTY.

"Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-9 (1973). A tribal member going outside the reservation to live must be prepared to comply with the same laws as other state residents, including state income tax laws applicable to all citizens of the state. Absent an express act of Congress exempting reservation income from such a tax, Indians living off the reservation are subject to state income tax in the same manner as other state citizens. No express act of Congress was cited by the court of appeals in its opinion. None exists.

A state tax imposed within a reservation is generally precluded because "the federal tradition of Indian immunity from state taxation is very strong and . . . the state interest in taxation is correspondingly weak." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215, n.17 (1987). Indians going outside reservations to live enjoy no tradition of immunity from state law, and the state has significant interests in imposing generally applicable taxes on all residents. Absent express federal law, such taxes are not preempted, nor do they infringe on tribal sovereignty.[7]

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[7] Economic impact on a tribal employer is not enough to justify preemption of a state tax. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989). Nor does the possibility of the imposition of both a state and tribal tax infringe on tribal sovereignty. *Id.* at 189; *Colville*, 447 U.S. at 158-9. A concurring opinion in *Colville* aptly pointed out that Indians must recognize the sovereign status of states in tax matters: "If Indians are to function as quasi co-sovereigns with the States, they like the States, must adjust to the economic realities of that status as every other sovereign competing for tax revenues, absent express intervention by Congress." 447 U.S. at 186 (Rehnquist, J., concurring).

CONCLUSION

The judgment of the court of appeals that a tribal member who resides outside the reservation is not subject to state income tax on income earned on the reservation should be reversed.

Respectfully submitted.

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